314 U.S. 622

(23)

FILED
JUN 6 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 134

ARROW DISTILLERIES, INC., AN ILLINOIS CORPORATION,
Petitioner,

vs.

ARROW DISTILLERIES, INC., A MICHIGAN CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

DONALD A. GARDINER,
Woodward Building,
Washington, D. C.,
Counsel, Arrow Distilleries, Inc., Petitioner.

IRA J. COVEY,
JULIAN B. VENEZKY,
1223 Jefferson Bldg.,
Peoria, Illinois,
Of Counsel for Petitioner.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

PETITION.

PAGE

Statement of the Case 2

Questions Involved 3

Reasons for Granting Writ 4

BRIEF.

Preliminary Matters:

Opinions Below 7

Jurisdiction 7

Statement of the Case 7

Specifications of Error 8

Argument 9

(A) The Circuit Court of Appeals erroneously applied the Rule established in *Davis* v. *Schwartz*, 155 U. S. 631, to the instant case. By the order of reference the conclusiveness ordinarily applied to the Master's findings was distinctly reserved to the District Court (R. 50, 51) 9

(B) Where the Master's findings does not depend upon the weighing of conflicting testimony or credibility of witnesses, it does not have the weight ordinarily attaching to the conclusions of the Master upon conflicting evidence 12

(C) Incorporation of a Company under a corporate name confers no right to said name or the dominant portion thereof without user thereof and does not vest property rights in incorporators as against a prior organization whether incorporated or not and using the same name. The foundation of a trade-mark or trade-name is priority of adoption and actual use in trade..... 14

(D) Petitioner having first adopted and used corporate name "Arrow Distilleries, Inc." and trade-mark "Arrow" on alcoholic liquors, it acquired the prior and exclusive right to their use on goods of the same descriptive properties 17

(E) Where the Master fails to make a fact finding on a material issue but the facts appear in the evidence as reported by him, it was the duty of the District Court under the order of reference to make the findings without a re-reference, and enter its conclusions of law thereon and enter such decree as was equitable in the premises... 18

(F) Where there is no concurrent finding on material issues and where the findings of the District Court and of the Circuit Court of Appeals are diametrically conflicting, this Court should examine the evidence at length for the purpose of determining the facts 21

Conclusion 22

Table of Cases.

American Foundries v. Robertson, 269 U. S. 372..... 15
American Washboard Co. v. Saginaw Mfg. Co., 103 Fed. 81 .....5, 18
Brown Chemical Co. v. Meyer, 139 U. S. 540..... 15
Carpenter, Babson & Fendler v. Connor Pic., 110 Fed. (2d) 317 21
Clark v. Schieble Toy & Nov. Co., 248 Fed. 276..... 21
Columbia Mills Co. v. Alcorn, 150 U. S. 461.....5, 17
Continental Corp. v. Nat. Union Radio Corp., 67 Fed. (2d) 938 18
Davis v. Schwartz, 155 U. S. 631.....3, 4, 8, 9
Denver v. Denver Union Water Co., 246 U. S. 178..4, 10, 21
Delaware & Hudson Canal Co. v. Clark, 13 Wall. 311.. 18
France Milling Co. v. Washburn Crosby, 7 Fed. (2d) 304 15
George v. Smith, 52 Fed. 830.....5, 18
Hanover Star Milling Co. v. Metcalf, 240 U. S. 403.... 18
Holland Furnace Co. v. New Holland Mach. Co., 24 Fed. (2d) 751 15
Hovarth v. McCord Radiator & Mfg. Co., 100 Fed. (2d) 326 .....4, 6, 12, 19
In Re Duvall, 103 Fed. (2d) 653.....4, 12, 14
In Re Michel, 56 Fed. (2d) 15.....4, 5, 6, 11, 14, 21
In Re Trademark Cases, 100 U. S. 82.....5, 17
Kimberly v. Arms, 129 U. S. 512..... 10
McLean v. Fleming, 96 U. S. 245..... 18
Morimura, Arai & Co. v. Taback, 279 U. S. 24..... .....4, 5, 6, 12, 13, 20, 21

National Circle, Daughters of Isabella v. National Order, Daughters of Isabella, 270 Fed. 723.....5, 14
Peck Bros. Co. v. Pock, 113 Fed. 291..... 15
Small v. Kiel, 101 Fed. (2d) 444.....4, 12
Syracuse Eng. Co. v. Haight, 110 Fed. (2d) 468...5, 11, 14
Tilghman v. Proctor, 125 U. S. 136.....5, 13
United Drug Co. v. Obear-Nestor Glass Co., 111 Fed. (2d) 997 .....5, 14
United Drug Co. v. Rectanus Co., 248 U. S. 90.....15, 18
Walter Baker & Co. v. Delapenha, 160 Fed. 746.....5, 17
Wilson v. Hall, 81 Fed. (2d) 918.....4, 5, 6, 12, 14, 21
Witters v. Soles, 43 Fed. 405..... 6

STATUTES CITED.

Federal Rule of Civil Procedure, 52 (a), 28 U. S. C. A. following Section 723 (c)..... 9
Title 28 U. S. C. A. Section 347.....7, 21
U. S. Constitution, Amendment 21, Section I..... 15

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. .....

ARROW DISTILLERIES, INC., (AN ILLINOIS CORPORATION),

Petitioner,

vs.

ARROW DISTILLERIES, INC., (A MICHIGAN CORPORATION),

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, Arrow Distilleries, Inc., an Illinois Corporation, prays that a Writ of Certiorari issue to review the judgment and decree of the Circuit Court of Appeals for the Seventh Circuit, rendered on February 11, 1941, (rehearing denied March 14, 1941), reversing the decree of the United States District Court for the Southern District of Illinois, Northern Division. (R. 592.)

Statement of the Case.

On January 16, 1936, Respondent, Arrow Distilleries, Inc., a Michigan corporation, filed its Complaint in the District Court of the United States for the Southern District of Illinois, Northern Division, against Petitioner, Arrow Distilleries, Inc., an Illinois corporation, charging unfair competition because of Petitioner's use of the corporate name "Arrow Distilleries, Inc." and trade name "Arrow" and praying for damages. Petitioner in its Answer filed October 10, 1936, denied the allegations of the Bill and asserted a counterclaim claiming the exclusive right to use its corporate name "Arrow Distilleries, Inc." and trade name "Arrow" because of its priority of adoption and use and asked for an accounting of profits from Respondent.

The case was referred to William H. Moore, as Special Master, Paragraph 1 of the Order of Reference reads in part as follows (R. 51):

> "* * * to hear the parties and to take testimony herein and the interrogatories and the answers thereto and to report his findings of fact and the conclusions of law thereon to the Court. Nothing herein contained, however, shall be construed as meaning that the Special Master's findings of fact or conclusions of law shall be final but only that he shall find the facts and make his conclusions of law for the purpose of aiding the Court, and any party to this suit shall have the right to a review and a determination by the Court upon the evidence reported by the Special Master."

The Master in his Report (R. 518) found the equities with Respondent and recommended Petitioner be enjoined in the use of the aforesaid names. The Master, in preparing his report, failed to make any finding on many of the material facts.

The Petitioner thereupon filed its objections to the Special Master's Report and the matter came to a hearing

before the District Court on Petitioner's objections to the Special Master's Report.

On January 16, 1940, the District Court filed its findings of fact and conclusions of law therein (R. 531), together with its interlocutory decree dismissing Respondent's Complaint and enjoining Respondent from a continuation of the use of the aforesaid corporate name and trade name, and expressly reserving the right to, at a future time, determine, pass upon and adjudicate an account between said parties, and holding the equities to be with Petitioner.

On April 11, 1940, the District Court overruled Respondent's Motion for a new trial and to vacate the decree. (R. 550.)

On May 9, 1940, Respondent filed in said District Court, its Notice of Appeal to the Circuit Court of Appeals under Rule 73, Section (b), of the Federal Rules of Civil Procedure, from the Decree entered in this cause by said District Court on January 16, 1940.

On February 11, 1941, the Circuit Court of Appeals for the Seventh Circuit filed its opinion reversing the District Court (R. 592) and holding that the District Court was without authority in law to reject the findings of the Master unless clearly erroneous. Petition for rehearing was denied March 14, 1941. (R. 613.)

Questions Involved.

1. Did the Circuit Court of Appeals erroneously apply the Rule established in *Davis* v. *Schwartz,* 155 U. S. 631, to the instant case, where by the Order of Reference the conclusiveness ordinarily applied to the Master's findings was distinctly reserved to the District Court?

2. Does a Master's findings, which do not depend upon the weighing of conflicting testimony or credibility of wit-

nesses, have the same weight ordinarily attaching to the conclusions of a Master based upon conflicting evidence?

3. Does the mere incorporation without user of the corporate name vest property rights in the incorporator as against a prior organization unincorporated and using the same name?

4. Does the first adoptor and user of a corporate name and trade name acquire the prior and exclusive right to their use on goods of same descriptive properties?

5. Was it error for the District Court to make findings on material issues where the Master failed to make a fact finding on these material issues and the facts appeared in the evidence as reported by the Master?

6. Where the findings of the District Court and of the Circuit Court of Appeals are diametrically conflicting should this Court examine the evidence at length for the purpose of determining the facts?

Reasons for Granting the Writ.

(A) The decision of the Circuit Court of Appeals in adopting in the instant case the doctrine of *Davis* v. *Schwartz*, 155 U. S. 631, as to the unassailability of Master's findings in view of the specific nature of the order of reference, ignores and is in conflict with the principles of law established by decisions of this Court; of the Circuit Courts of Appeal in analogous cases in other Circuits and the former decisions of the Circuit Court of Appeals for the Seventh Circuit. *Denver* v. *Denver Union Water Co.*, 246 U. S. 178; *Morimura, Arai & Co.* v. *Taback*, 279 U. S. 24; *Hovarth* v. *McCord Radiator & Mfg. Co.*, 6th Cir., 100 Fed. (2d) 326; *In Re Michel*, 2nd Cir., 56 Fed. (2d) 15; *Wilson* v. *Hall*, 4th Cir., 81 Fed. (2d) 918; *Small, et al.* v. *Kiel*, 8th Cir., 101 Fed. (2d) 444; *In Re Duvall*, 7th Cir.,

103 Fed. (2d) 653; *Syracuse Eng. Co.* v. *Haight,* 2nd Cir., 110 Fed. (2d) 468.

(B) The decision of the Circuit Court of Appeals in adopting in the instant case the doctrine of *Davis* v. *Schwartz, supra,* where the Master's findings does not depend upon the weighing of conflicting testimony or credibility of witnesses and does not, therefore, have the weight ordinarily attaching to the conclusions of the Master upon conflicting testimony, is in conflict with the principles of law established in analogous cases by this Honorable Court and by the Circuit Courts of Appeal in other Circuits. *Tilghman* v. *Proctor,* 125 U. S. 136; *Morimura, Arai & Co.* v. *Taback,* 279 U. S. 24; *In Re Michel,* 2nd Cir., 56 Fed. (2d) 15; *Wilson* v. *Hall,* 4th Cir., 81 Fed. (2d) 918, 919; *United Drug Co.* v. *Obear-Nestor Glass Co.,* 8th Cir., 111 Fed. (2d) 997, 999; *Syracuse* v. *Haight,* 2nd Cir., 110 Fed. (2d) 468, 470.

(C) The decision of the Circuit Court of Appeals in the instant case has the effect of ignoring and is in conflict with the principles of law established by decisions of this Honorable Court and of the Circuit Courts of Appeal in analogous cases in other Circuits which establish the doctrine that "the foundation of a trade mark or trade name is priority of adoption and actual use in trade and that mere incorporation without user of corporate name on goods of the same descriptive properties does not vest property rights in incorporator as against a prior organization unincorporated and using the same or a similar name. *Columbia Mills Co.* v. *Alcorn,* 150 U. S. 461; *In Re Trademark cases,* 100 U. S. 82; *Walter Baker & Co.* v. *Delapenha,* 3rd Cir., 160 Fed. 746; *American Washboard Co.* v. *Saginaw Mfg. Co.,* 6th Cir., 103 Fed. 81; *George* v. *Smith,* 52 Fed. 830; *National Circle, Daughters of Isabella* v. *National Order, Daughters of Isabella,* 2nd Cir., 270 Fed. 723.

(D) The decisions of the Circuit Court of Appeals in rejecting the District Court's findings on material issues

where the Master failed to make such findings, ignores and is in conflict with the decisions of this Honorable Court and of the Circuit Courts of Appeal in analogous cases in other Circuits. *Morimura, Arai Co.* v. *Taback,* 279 U. S. 24; *Hovarth* v. *McCord Radiator & Mfg. Co.,* 100 Fed. (2d) 326; *Witters* v. *Soles,* 43 Fed. 405; *In Re Michel,* 2nd Cir., 56 Fed. (2d) 15; *Wilson* v. *Hall,* 4th Cir., 81 Fed. (2d) 98.

(E) Where there is no concurrent finding on material issues and where the findings of the District Court and of the Circuit Court of Appeals are diametrically conflicting, this Court should examine the evidence at length for the purpose of determining the facts. *Morimura, Arai & Company* v. *Taback,* 279 U. S. 24.

WHEREFORE, it is respectfully prayed that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

DONALD A. GARDINER,
Attorney for Petitioner.

IRA J. COVEY,
JULIAN B. VENEZKY,
Of Counsel.